A

KKB Engineering Bhd v CEO Nexus Sdn Bhd

B HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24L-95/11 OF 2012
RHODZARIAH BUJANG J
11 APRIL 2013

C *Land Law — Charge — Order for sale — Whether chargor's grounds to oppose application for order for sale had merits*

D The defendant had charged its land ('the land') to the plaintiff as security to allow another entity, Global Upline, a six-month grace period to settle its RM8m debt to the plaintiff. The charge had also included another piece of land owned by another company, Little Property Sdn Bhd ('Little Property') but that property was subsequently discharged from the charge. After making a part payment of RM3m to the plaintiff, Global Upline failed to settle the balance of its debt prompting the plaintiff to file the instant application for an order for sale of the land. Amongst the issues the defendant raised to resist the E application was that a 'collateral agreement' existed between the plaintiff, its subsidiary, KKB Builders, and Global Upline that the amount owing under the charge was to be set off against a substantial amount KKB Builders owed Global Upline. This collateral agreement, the defendant claimed, was evidenced in a letter written by the defendant's solicitor. The defendant also F claimed that the plaintiff's act of discharging Little Property's charge without the defendant's knowledge or consent caused the defendant's liability under the charge to be extinguished.

G **Held**, allowing the plaintiff's application with costs fixed at RM5,000 and granting the order for sale:

(1) Even assuming the 'collateral agreement or arrangement' existed between the parties it was not a good ground or just cause to avoid granting the order for sale because the arrangement was not made by the plaintiff but H by another legal entity. Although the two companies were related, in law they were still separate from each other (see para 13).

(2) The court required more concrete proof to show the existence of the 'collateral agreement' than just the defendant's solicitor's letter as the parties were not dealing with paltry sums but with multimillion ringgit I worth of business or contracts. Such collateral agreement should, in the ordinary course of business, be reduced into writing and not be left to be inferred by conduct or be simply mentioned in a letter of the party asserting its existence without an acknowledgement of its existence by the other party (see para 13).

(3) The court could also not give any weight to the existence of the 'collateral agreement' as the civil suit between Global Upline and KKB Builders had been stayed pending arbitration of the dispute. Given the uncertainty of the fate of that action the issue raised could not be used to determine the exercise of the plaintiff's statutory right as chargor (see para 14).

(4) There was no necessity for the plaintiff to have obtained the defendant's consent nor that of Global Upline's to discharge Little Property's charge as cl 8 of the charge document explicitly gave the plaintiff absolute power to do so. The mere fact the plaintiff had discharged Little Property's charge could not make it 'unjust' to order the sale of the defendant's property. If the defendant had been the owner of both the charged properties then its consent would have had to be sought or at least it would have had to be informed of the decision to discharge one property over the other (see para 10).

(5) The plaintiff's wait of about two and half years from the receipt of the RM3m part payment before it issued its letter of demand under the charge was not ominous to the fate of its application for order for sale. Item 114 of the Sarawak's Limitation Ordinance provided for a limitation period of 60 years — running from the time when the monies secured by the charge became due — for a chargee to sue for foreclosure or sale of land (see para 12).

[Bahasa Malaysia summary

Defendan menggadaikan tanahnya ('tanah') kepada plaintif sebagai jaminan untuk membenarkan entiti yang lain, Global Upline, tempoh tangguh enam bulan untuk menyelesaikan RM8 juta hutangnya kepada plaintif. Gadaian tersebut juga termasuk sebidang tanah yang lain yang dimiliki oleh syarikat lain, Little Property Sdn Bhd ('Little Property') tetapi hartanah tersebut kemudiannya dilepaskan daripada gadaian tersebut. Selepas membuat bayaran RM3 juta kepada plaintif, Global Upline gagal untuk menyelesaikan baki hutangnya menyebabkan plaintif memfailkan permohonan ini untuk perintah jualan tanah tersebut. Di antara isi-isu yang dibangkitkan oleh defendan untuk menentang permohonan adalah bahawa 'collateral agreement' wujud di antara plaintif, subsidiarinya, KKB Builders, dan Global Upline bahawa jumlah yang dihutang di bawah gadaian mesti di 'set off' terhadap jumlah substansial yang KKB Builders berhutang kepada Global Upline. Defendan mendakwa, perjanjian kolateral ini dibuktikan dalam surat yang ditulis oleh peguam defendan. Defendan juga mendakwa bahawa tindakan plaintif melepaskan gadaian Little Property tanpa pengetahuan defendan atau izin menyebabkan liabiliti defendan di bawah gadaian dibatalkan.

Diputuskan, membenarkan permohonan plaintif dengan kos ditetapkan sebanyak RM5,000 dan membenarkan perintah jualan:

(1) Dengan menganggap 'collateral agreement or arrangement' wujud di

antara pihak-pihak ia bukan alasan baik atau sebab adil untuk mengelak pemberian perintah jualan kerana pengurusan tersebut bukan dibuat oleh plaintif tetapi oleh entiti undang-undang yang lain. Walaupun kedua-dua syarikat adalah berkait, dari segi undang-undang ia adalah berlainan daripada satu sama lain (lihat perenggan 13).

(2) Mahkamah memerlukan bukti yang lebih kukuh untuk menunjukkan kewujudan 'collateral agreement' daripada semata-mata surat peguam defendan memandangkan pihak-pihak bukan berurusan dengan jumlah wang yang sedikit tetapi dengan perniagaan atau kontrak yang bernilai berjuta-juta ringgit. Perjanjian kolateral sedemikian patut, dalam perjalanan perniagaan biasa, sepatutnya dalam bentuk bertulis dan bukan dibiarkan untuk disimpulkan melalui tindakan atau hanya dinyatakan di dalam surat pihak yang mendesak kewujudannya tanpa pengakuan kewujudannya oleh pihak satu lagi (lihat perenggan 13).

(3) Mahkamah juga tidak memberi apa-apa penilaian kepada kewujudan 'collateral agreement' memandangkan tindakan sivil di antara Global Upline dan KKB Builders telah ditangguh sementara menunggu timbang tara pertikaiannya. Dengan ketidakpastian keputusan tindakan, isu yang dibangkitkan tidak dapat digunakan untuk menentukan pelaksanaan hak statutori plaintif sebagai pemegang gadaian (lihat perenggan 14).

(4) Tiada keperluan untuk plaintif memperolehi izin defendan ataupun untuk Global Upline's melepaskan gadaian Little Property kerana klausa 8 dokumen gadaian dengan jelas memberikan plaintif kuasa mutlak untuk berbuat demikian. Fakta semata-mata plaintif telah melepaskan gadaian Little Property tidak membuatkannya 'unjust' untuk memerintah penjualan hartanah defendan. Jika defendan adalah pemilik kedua-dua hartanah yang digadaikan kebenarannya mesti dipohon atau sekurang-kurangnya ia patut diberitahu mengenai keputusan untuk melepaskan satu hartanah ke atas yang satu lagi (lihat perenggan 10).

(5) Penangguhan plaintif selama dua setengah tahun setelah menerima bahagian bayaran RM3 juta sebelum ia mengeluarkan surat tuntutannya di bawah gadaian tidak membimbangkan kepada nasib permohonannya untuk perintah jualan. Item 114 Ordinan Had Masa Sarawak memperuntukkan untuk tempoh had masa 60 tahun — berjalan dari masa apabila wang dijamin oleh gadaian menjadi kena dibayar — untuk pemegang gadaian menyaman untuk perampasan atau jualan tanah (lihat perenggan 12).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2706–2873.

Cases referred to

Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd [2004] 4 CLJ 793, CA (refd)
Citibank NA v Jong Tze Khiok & Anor [1993] 3 MLJ 449, SC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
HSBC Bank Malaysia Bhd v Tan Sri Datuk Amar Ling Beng Siew [2003] 4 CLJ 763, HC (refd)

Legislation referred to

Contracts Act 1950 s 86
National Land Code s 256, 256(3)
Sarawak Land Code (Cap 81) ss 148, 148(1), (2), (2)(c), (3)
Sarawak's Limitation Ordinance Item 114

Winnie Wong (Barak Legal Practice) for the plaintiff.
Bong Ah Loi (Suhaili & Bong) for the defendant.

Rhodzariah Bujang J:

[1] The plaintiff in this action seeks to enforce its statutory right to sell the defendant's land which have been charged to it vide a memorandum of charge registered on 7 July 2009. The charge was executed pursuant to an acknowledgement and deed of settlement ('the said deed') entered into by the plaintiff, the defendant and one Global Upline Sdn Bhd and it was as a security to allow Global Upline a grace period of six months from the date of the execution of the said deed, 24 April 2009, to pay the plaintiff RM8m owing to it and to withhold legal action for its recovery during the said period. Global Upline only paid a sum of RM3m and therefore the amount owing as at 20 June 2012 was RM6,319,178.08 which was inclusive of a 10%pa interest as stipulated in cl 3(e) of the memorandum of charge. The charge also covers another piece of land owned by Little Property Sdn Bhd but this action, it must be made clear, is only pursued against the defendant and not Little Property Sdn Bhd.

THE AFFIDAVIT IN OPPOSITION

[2] The defendant deposed that the plaintiff is the parent company of KKB Builders Sdn Bhd ('KKB Builders') who awarded a project in Bintulu to the defendant for RM58m. KKB Builders, contended the defendant, still owes Global Upline RM31,643,887.15 from the project. The defendant also contended that it was mutually agreed between the plaintiff, KKB Builders and Global Upline that the amount outstanding under the charge be set off against

the amount due to Global Upline under that Bintulu project. This collateral agreement is evidenced, said the defendant, in their advocate's letter dated 2 July 2012 (exh D5 to the affidavit in opposition). The defendant further deposed that Global Upline has also filed a suit against KKB Builders in the High Court in Kuching (Suit No 22–133/6 of 2012).

[3] That suit has been stayed by the court and referred to Kuala Lumpur Regional Centre for Arbitration, replied the plaintiff who also averred that the partial payments for the Bintulu project has no bearing on this case as that suit which dispute is being arbitrated does not concern them at all because KKB Builders is a separate legal entity altogether.

[4] The defendant has refuted the different legal entities argument of the plaintiff by saying that the managing director of the plaintiff and KKB Builders is the same person, Dato' Kho Kak Beng and that Global Upline is applying to set aside the stay order made by the court. It also deposed that the plaintiff has in fact partially discharged the charge and released Little Property Sdn Bhd without the knowledge and consent of the defendant. This unilateral act, according to the defendant, have in turn discharged them of any liability under the memorandum of charge.

[5] I would take this last point first.

THE DISCHARGE OF LIABILITY

[6] The defendant's counsel, Mr Bong Ah Loi, in support of the defendant's stand on the discharge of their liability drew my attention to s 86 of the Contracts Act 1950 which provides as follows:

> Any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharge the surety as to transactions subsequent to the variance.

[7] He cited the Federal Court case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 where the application of that section was discussed by the court. With respect, I am unable to agree that s 86 of the said Act applies in this case, which is exactly the view of Ms Winnie Chin, counsel for the plaintiff. It is clearly a provision which governs guarantors in an action brought personally against them and has to be contrasted with an action in rem brought against the property, of which this case is. There is therefore no necessity to obtain their consent and nor that of Global Upline's to the partial discharge and release of Little Property as a co-chargor especially when cl 8 of the memorandum of charge very explicitly clothes the chargee with the absolute power to do what they have done in the following words:

> The chargee may at any time and without further reference to the changor give up, deal with, vary, exchange or abstain from perfecting or enforcing any other security or securities at any time and discharge any party to them or any of them, and realize such security or securities or any or them as the chargee may think fit without in any way affecting or prejudicing the security given hereunder.

[8] I would be doing an injustice to Mr Bong Ah Loi's industry and his client, if I do not, despite my conclusion above, go further to decide his submission that my power to order the sale of the property under s 148(2) of the Sarawak Land Code is not as circumscribed as that of a judge under the equivalent provision of s 256(3) of the National Land Code. This is because, said Mr Bong Ah Lo in the words of s 148(2) the court is to make, inter alia, the order for sale 'as in the circumstances seems just' whereas in s 256 of the National Land Code, the court must make the order 'unless it is satisfied of the existence of cause to the contrary'. That such a distinction exists has been acknowledged by the Court of Appeal in *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793 where Gopal Sri Ram JCA (as His Lordship then was) opined that the courts in Sarawak must be guided solely by the justice of the case and has a choice of making one of the three orders prescribed therein, that is to say, an order for the sale of the land or for an order of possession and be registered as proprietor of the land or to receive the rents and profits of the charged land.

[9] When s 148(2) is read in the light of His Lordship's decision and given their ordinary and natural meaning (as Mr Bong Ah Loi said I should) the discretion spoken of by Mr Bong Ah Loi conferred by the words 'as in the circumstances seems just' refers to the choice of three orders I could make as stated earlier and the word 'such order' could only refer to either one of the three orders described in the said subsection. However, since the first two orders are clearly not feasible and unsupported by the factual evidence, the only order left for me to make is the order for sale, once I am satisfied that there is a failure to comply with the statutory notice. The discretion, in other words, conferred by the section is not as free ranging as it was made out to me by the defendant.

[10] Even if my interpretation above were flawed, the mere fact that the plaintiff as chargor chose to discharge one of the charged property over the other could not on the face of it make it 'unjust' to order the sale of the other property belonging to the defendant. It is because the defendant is not the owner of both the properties where, if that were the case, I would think that their consent should be sought; or at least they should be informed of the decision to discharge one and not the other. This reasoning is similar to that adopted by Clement Skinner J in *HSBC Bank Malaysia Bhd v Tan Sri Datuk Amar Ling Beng Siew* [2003] 4 CLJ 763 where His Lordships held that the

unilateral increase by the plaintiff bank of the limit of the overdraft facility stated in the charge which was granted to the debtor company, Dominance Resources Sdn Bhd, may form the basis of an action in personam for breach of contract but not a ground to say that it would not be just to order the sale of the defendant's land, charged to the plaintiff bank as security for the overdraft facility.

[11] Before I move on to consider the mainstay of the defendant's objection against the granting of the order for sale, which is their allegation on the existence of that collateral agreement on the set off agreed between KKB Builders with Global Upline, there is another collateral issue raised in respect of the delay in the enforcement of the charge against them.

THE ENFORCEMENT DELAY

[12] Clause 2 of the memorandum of charge provides that Global Upline, the debtor, undertakes and shall settle the debt within six months from the execution of the deed of settlement which was 24 April 2009. The defendant pointed out that the plaintiff's first letter of demand was only served on Global Upline and the defendant on 22 June 2012, 32 months after the accrual of the plaintiff's right to enforce the charge. Ms Winnie Wong highlighted in her submission in reply that there is no such lengthy delay because there was this part payment of RM3m on or about 8 February 2010 which saw a partial discharge of the charge. I agree with her that the part payment is a material consideration and though she did not mention this in her submission, the issue of delay must be viewed against the law as well. Item 114 of the Sarawak's Limitation Ordinance provides a limitation period of 60 years for a chargee to sue for foreclosure or sale of the land. That 60 years runs from the time when the money secured by the charge becomes due. Viewed in that perspective, the wait of about two and half years from the receipt of the part payment does not seem ominous to the fate of this application but Mr Bong Ah Loi has another take on the delay. He submitted the 'delay' is proof that there exists that collateral agreement which I mentioned earlier.

THE COLLATERAL AGREEMENT

[13] Even assuming that the said agreement or arrangement exist between the parties, I could not consider it as a good ground or just cause to avoid granting the order for sale for the simple reason that the arrangement was not made by the plaintiff but another legal entity. Although the two companies are related, in law they are still separate from each other and I would require a more concrete proof than just the defendant's solicitor's letter (exh D5) on its existence. The reason is the parties are not just any illiterate persons on the street contracting on some paltry sums but dealing with multimillion business

or contracts. Such collateral agreement should in the ordinary course of business be reduced in writing and not left to be inferred by their conduct, or with respect, simply mentioned in one party's letter, particularly in the letter of one who is making the assertion of its existence and without an acknowledgment of its existence by the other party.

[14] The other reason not to give any weightage to that collateral agreement is that court case between Global Upline and KKB Builders have been stayed pending arbitration and an arbitrator has, according to the plaintiff, been appointed. How could I then, given the uncertainty of the fate of that action, used it to determine the exercise of the statutory right of the plaintiff as chargor in this case?

[15] Much as I wanted to end this judgment with that rhetorical question, I would, again in fairness to Mr Bong deal with his last point of submission which is a contention that the statutory notice issued to the defendant is invalid.

THE INVALID STATUTORY NOTICE

[16] Clause 16 of the memorandum of charge provides as follows:

> 16 Default and statutory notice.
>
> In the event of the default of the changor in failing to pay the debt outstanding on the debtor's default or the chargor breaches any of the agreements covenants terms stipulations and undertakings herein provided which default continues for a period of more than seven (7) days after written notification to the changor to remedy the default it shall be lawful for the chargee forthwith to give the *statutory notice under the Land* Code (Cap 81) of Sarawak requiring *the chargor to remedy the said breach within a period of not less than fourteen (14) days of receipt before the chargee* resort to any of the remedies provided by the Land Code (Cap 81) of Sarawak.

[17] The defendant referred to the notice of demand dated 22 June 2012 (exhibited as 'DAD4' to the affidavit in support of Diwek ak Dayus) in which the plaintiff demanded that the amount due be settled within *seven days* from the receipt of it failing which they would 'proceed to foreclose the abovementioned property to recover the same'. (Emphasis added.) That, according to the defendant, is clearly against cl 16 which stipulated a period of 14 days.

[18] Section 148(1) of the Land Code provides that a chargee serves a notice of default on the chargor before he resorts to all available remedies against the chargor and s 148(3) further provides that the said notice must comply with the terms of the charge, with a provision that if no period is specified therein, than the period stipulated therein must be thirty days. It is good that I remind myself of the significance of the statutory notice from the Supreme Court's decision in *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449. Jemuri Serjan CJ (Borneo) in that case held that under s 148(1) of the Code, it is the default and not the demand for payment under the charge which triggers off the right of the chargee to issue the notice in writing. Such notice is not intended for the purpose of demanding payment of the amount due but to notify the chargor that the chargee would resort to s 148(2)(c) for an order of sale of the charged land unless such default is remedied.

[19] Though there is that apparent discrepancy in the period given in the said notice with cl 16, the discrepancy is rendered immaterial by a supplementary affidavit filed by Ms Winnie Wong which shows that due to inadvertence, they have exhibited the wrong notice — exh DAD4 was not the statutory notice of demand but the one she exhibited to her affidavit (exh DAD4A), is. That notice is dated 11 July 2012 and gives a 30 days period for compliance and very clearly stated, unlike the previous one, that the plaintiff 'shall institute foreclosure proceedings under s 148 of the Land Code (Cap 81) in respect to the above mentioned property to recover the same'.

[20] Thus, it is apparent to me that the first notice was the contractual notice of demand as provided in the first part of cl 16 which must be complied with within a seven days period whilst the second notice dated 11 July 2012 is the statutory notice which in fact gave an enlarged period for compliance, from 14 days stated in cl 16 to 30 days. There is no denial by the defendant that these two notices were served on them which I must make clear are accompanied by the evidence of posting in the form of registered slips from Pos Malaysia. With respect, the objection is again taken without merit.

[21] On all these considerations, the application of the plaintiff is allowed and an order for sale granted with the sale to be held by way of a public tender. Cost of the application is fixed at RM5,000.

Application allowed with costs fixed at RM5,000 and order for sale granted.

Reported by Ashok Kumar